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Ratepayer Advocate and Director

June 10, 1999

ECFS AND OVERNIGHT
Ms. Magalie Roman Salas
Office of the Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Room TW-A325
Washington, DC 20554

Re: I/M/O Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 CC Docket No. 96-98
NPRM FCC 99-70

Dear Secretary Salas:

The New Jersey Division of the Ratepayer Advocate ("Ratepayer Advocate") has reviewed the comments submitted by various interested parties in connection to the petition filed in this matter and we are electronically filing our reply comments.

Very truly yours,

Blossom A. Peretz, Esq.,
DIVISION OF THE RATEPAYER ADVOCATE

By: _____
Christopher J. White, Esq.
Asst. Deputy Ratepayer Advocate

CW/pc

cc: Service List

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

IN THE MATTER OF	)	
	)	
IMPLEMENTATION OF THE LOCAL COMPETITION PROVISIONS IN THE TELECOMMUNICATIONS ACT OF 1996	)	CC DOCKET NO. 96-98

REPLY OF THE DIVISION OF THE RATEPAYER ADVOCATE STATE OF NEW JERSEY

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Dated: June 10, 1999

INTRODUCTION AND EXECUTIVE SUMMARY

The Division of the Ratepayer Advocate ("Ratepayer Advocate"), an independent agency of the State of New Jersey representing the interests of all classes of New Jersey consumers submits its reply comments on the Federal Communications Commission's ("FCC's") Second Further Notice of Proposed Rulemaking[1] issued in response to the Supreme Court's decision in January, 1999 in *AT&T Corp. v. Iowa Utils. Bd.*, __ U.S. __, 67 U.S.L.W. 4104, 1999 WL 24568 (Jan. 25, 1999), *reversing in part and affirming in part, Iowa Utils Bd., v. FCC*, 120 F.3d 753 (8th Cir. 1997). As explained below, the Supreme Court vacated Section 51.319 of the FCC's rules. 47 C.F.R. § 51.319. These rules identified a specific list of unbundled network elements ("UNEs") that incumbent Local Exchange Carriers ("LECs") had to make available to telecommunication carriers.

As a result of the Supreme Court's decision, the FCC issued the NPRM and sought comments and replies on a number of issues. The FCC asked the public to address the following areas:

A. identification of UNE's on a nationwide basis
B. interpretation of the term "proprietary"
C. interpretation of the term "necessary"
D. interpretation of the term "impair"
E. differences between "necessary" and "impair" standards
F. criteria for determining "necessary" and "impair" standards (including the essential facilities doctrine and availability and cost of UNE's outside the incumbent's network)
G. weight to be given various factors, and
H. application of criteria to previously identified UNEs and how prospective modifications to UNEs should be made.

The Ratepayer Advocate offers the following reply to what it believes are the most

[1] See I/M/O Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers, CC Docket No. 95-185, FCC 99-70, released April 16, 1999. ("NPRM")

significant and important of the issues raised from the perspective of successful implementation of the Federal Telecommunications Act of 1996[2] ("Act" or "1996 Act"). Specifically, the Ratepayer Advocate believes (1) that the terms " necessary" and "impair" must be liberally interpreted and applied and additional factors considered, (2) that the minimum list of UNEs should be expanded to include subloop unbundling and dark fiber; and (3) that the FCC should direct competitive LECs to unbundle their networks to further enhance competition.

In summary, the Ratepayer Advocate urges that the FCC should continue to advance the procompetitive goals of the Act. Section 251(d)(2) of the Act sets forth minimum test for determining which UNEs must be made available to telecommunications carriers in furtherance of Section 251(c)(3) of the Act. (otherwise referred to as "wholesale entry"). Local exchange competition can not develop without access to the incumbent LECs networks. Interpreting what Congress intended when it used the terms, "necessary," "impair," and "proprietary" in Section 251(d)(2) is crucial to the success of the Act.

As explained more fully below, the Ratepayer Advocate believes that in interpreting these terms, one must be guided by the dual purposes of the Act which are one, in the short term to open up competition in the local exchange market and two, for the future, to maintain such competition in furtherance of the public interest. This requires a continuous and on going analysis of the state of competition over time so that re-emergence of monopoly markets in the local exchange markets can not occur. Local exchange markets are in transition from plain old telephone service ("POTs") to digital broadband, fiber optic technology and advanced video, voice and data using switched

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[2] See the Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56, codified as amended in scattered sections of Title 47 of the United States Code (hereinafter referred to as the "Act" or "1996 Act").

packages of data. Well crafted and throughly thought out rules are the foundation for promoting the statutory scheme of the Act now and in the future. Narrowly crafted rules or rules which are not continually reviewed and evaluated over time are inimical to the Act. The development of competition should be paramount followed by ensuring that rules may be changed or modified as necessary so that meaningful competition is fostered in the first instance and that competition is ultimately maintained into the future.[3]

BACKGROUND

The 1996 Act significantly alters the legal and regulatory framework governing the local exchange market place. Congress sought to establish "a procompetitive, deregulatory national policy framework" for the telecommunications industry in the United States. One of the corner stones of that policy is the opening of the local exchange market to competition. Congress envisioned local exchange competition developing in three ways, through (1) construction of new networks, i.e., facilities-based competition, (2) interconnection -- the use of unbundled elements of the incumbent's network, and (3) resale of existing incumbent Local Exchange Carriers ("LECs") services. The 1996 Act, along with implementing regulations was intended to eliminate prior statutory, regulatory, and economic barriers to competition. Those barriers resulted in the incumbent LEC having a monopoly in its respective markets. LECs have economies, density, connectivity, and scale which have enabled them to preclude entry into their markets.

Sections 251 and 252 of the 1996 Act are intended to open the local exchange market to

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[3] Over 65 comments were filed in this proceeding. These comments differ on the what are the appropriate questions and what are the appropriate answers. In lieu of replying to each specific comment, we believe the broad policies discussed in our reply are the appropriate policy considerations in formulating final rules in this proceeding.

competition by imposing new interconnection, unbundling and resale obligations on all incumbent LECs including the Bell Operating Companies, ("BOCs"). Section 251(c) of the 1996 Act requires incumbent LECs to provide requesting telecommunications carriers interconnection and access to unbundled elements at rates, terms and conditions that are just, reasonable, and nondiscriminatory, and to offer telecommunications services for resale.

Section 251(d)(2) authorizes the FCC to adopt access standards for unbundled network elements ("UNE's") and the FCC shall consider at a minimum:

> whether--
>
> (A) access to such network elements as are proprietary in nature is necessary; and
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> (B) the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that its seeks to offer.

In accordance with Section 251(d)(1) of the Act, the FCC promulgated regulations to implement the Act, which included the "necessary" and "impair" factors of Section 251(d)(2). See 47 C.F.R. § 51.319. The Supreme Court in *AT&T v. Iowa Utlis. Bd.*[4] concluded that the FCC did not adequately consider the "necessary" and "impair" factors of the Act. The Supreme Court found that the FCC, in deciding which elements must be unbundled, did not adequately take into consideration the "availability of elements outside the incumbent's network".[5] The Supreme Court questioned the FCC's "assumption that any increase in cost (or decrease in quality) imposed by a denial of a network element renders access to that element 'necessary,' and causes the failure to

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[4] See In *AT&T Corp. v. Iowa Utils. Bd.*, __ U.S. __, 67 U.S.L.W. 4104, 1999 WL 24568 (Jan. 25, 1999), *reversing in part and affirming in part, Iowa Utils Bd., v. FCC*, 120 F.3d 753 (8th Cir. 1997).

[5] See In *AT&T Corp. v. Iowa Utils. Bd.*, 119 S. Ct. at 735.

provide that element to 'impair' the entrant's ability to furnished its desired services."[6] The Supreme Court also criticized the FCC's interpretation of Section 251(d)(2) because it "allows entrants, rather than the Commission, to determine" whether the requirements of that section are satisfied.[7]

The citizens of New Jersey want meaningful competition, which hopefully will result in lower prices, more choices and technological innovation. The 1996 Act was passed and signed by President Clinton to usher in a new paradigm, of increased competition and less regulation in the telecommunications industry. The FCC's decisions in this proceeding will materially affect whether the goals of the Act are met for the citizens of New Jersey.

DISCUSSION

A liberal interpretation of Section 251(d)(2) is required.

Section 251(d)(2) should be interpreted for what it is: "a minimum" standard. The Act does not place an outer limit on what the FCC can do. As a minimum standard, it appears clear that the FCC has the authority to require incumbent LECs to provide access to any UNE in the exercise of its statutory authority. The FCC need only articulate a reasoned basis for its action. The FCC is not limited to the two factors set forth in Section 251(d)(2). Other factors may be used by the FCC. When access to UNEs involve "proprietary" information, the FCC must apply at least the two identified factors in Section 251(d)(2) of the Act.

The Ratepayer Advocate submits that Congress by specifying minimum factors intended that the FCC must direct the incumbent LEC to provide access to "proprietary" UNEs (make it

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[6] Id. at 733-36.

[7] Id. at 735.

mandatory that the incumbent LEC provide it to other telecommunications carriers) if both factors are met. In our opinion, Congress considered access to "proprietary" UNEs as necessary to the development of competition envisioned under the Act and the lack of access would impair a competing carrier from offering services. Proprietary material by its vary nature is material not available to third parties. Therefore, Congress did not want incumbent LECs to shield themselves from competition by raising proprietary concerns so as to thwart entry and access. The two factor test would ensure entry and access. In all other cases, we believe that Congress intended that the FCC would have unbridled discretion, subject only to the arbitrary, capricious and abuse of discretion standards to expand entry and access by requiring incumbent LECs to provide additional UNEs to new entrants.

A narrow interpretation of Section 251(d)(2) that restricts the availability of UNEs will hinder and delay competition.

The FCC must avoid adopting a narrow interpretation of this section. In our opinion, we believe the more reasonable and broader interpretation of this section is that the "necessary" and "impair" factors are minimum factors which apply to "proprietary" UNEs and the "impair" factor is the minimum factor which applies to "non-proprietary" UNEs. But, the two factors are not exclusive. The FCC may and should consider other factors as well in the exercise of its broad discretion irrespective of whether an UNE is labeled as "proprietary" or "non-proprietary."

The additional factors that the FCC can consider is not limited. Some of the more obvious factors are whether denying access to an UNE will delay or hinder the Act's goal of meaningful competition and whether there will be less regulation, more choice, and technological innovation in the local exchange market. If the FCC believes that access to any particular UNE will further the

goals and objectives of the Act and provides a reasoned basis for that determination, the FCC can direct that the UNE be made available by the incumbent LEC. In the case of "proprietary" UNEs, the FCC may decide access is warranted even if in weighing the two factors, the FCC concludes that these two factors alone are not controlling. The FCC can go beyond these factors and consider other factors. It is also clear that any decision made by the FCC is entitled to deference under the law.

The statutory scheme evidences a dynamic process whereby meaningful competition would develop quickly in the local exchange market. The arbitration and negotiation process with its strict time frame was a crucial component to jump start competition quickly. Along with this, the FCC was required to have implementing regulations within six months. It was intended that the combination of these complimentary approaches would hopefully result in robust competition where no competition previously existed. As a corner stone, the Act delegated to the FCC broad discretion to identify the UNEs to be provided including UNEs that are "proprietary."

After more than three years, this complimentary process has stalled and meaningful competition does not exist in the local exchange markets. There are many reasons for this situation. The most obvious is the extensive litigation the Act has generated and the long delays that arise from the review and appeal of decisions of the FCC and from decision involving arbitrations and negotiations conducted under Sections 251 and 252 of the Act. This state of affairs should not be ignored. More importantly, the Ratepayer Advocate believes this fact alone strongly suggests that the FCC must give a liberal interpretation to this section and be more aggressive in delineating UNEs if competition is to be a reality.

The Ratepayer Advocate submits that the FCC in weighing additional factors cannot ignore the "necessary" and "impair" standards but in the appropriate circumstance, the FCC could give

controlling weight to additional factors. Therefore, the FCC can and should be permitted to consider a multitude of factors in formulating national policies that are consistent with the Act and the public interest.[8] In short, Congress authorized the FCC to require that "proprietary" UNEs be made available if access was necessary and denying access would impair competition in the local exchange market by hindering or delaying it.

Expanding UNEs will promote the goals of the Act.

As discussed above, the FCC authorized telecommunications carriers to select either one of the three entry methods or any combination of the three methods. The three methods for entry are resale, wholesale (UNEs), or facility based competition in order to foster competition with the incumbent LEC. The FCC's adoption of minimum national standards for access to UNEs was consistent with, appropriate, and necessary if the goals of the Act are to be met. Those national standards will and must evolve over time as part of a balance and trade off process which measures whether the objectives of the Act when compared to the results obtained (market realities) are furthering or hindering the Act. The FCC in the exercise of such broad discretion, initially concluded that minimum elements must be provided if wholesale entry is to be a viable option in fostering competition. After more than three years, the FCC's action appears more appropriate than ever. The current list of UNEs has not fostered competition. An expanded list is necessary.

The term "proprietary" can have a very broad meaning. In general, it could include any intellectual property right recognized under the law such as copyright, patent, license or trade secret

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[8] If one assumed the contrary position, the FCC would be hamstrung in implementing the goals and objectives of the Act including establishment of uniform national policies. It is illogical and facially inconsistent with the Act to assume that Congress limited the FCC's authority while at the same time it gave new entrants the authority under Sections 251 and 252 of the Act to negotiate or arbitrate for access to any UNE.

as well as any commercial or financial information which if disclosed would cause substantial competitive harm (collectively referred to as "Proprietary Information"). Consistent with such a definition, if a particular UNE involved access to Proprietary Information, then the UNE may be subject to the "necessary" and "impair"analysis.[9]

A broad definition of Proprietary Information should be avoided. Section 251(d)(2) of the Act was intended to broaden the UNEs to be made available not restrict them. In fact, the FCC noted that in the *Local Competition First Report and Order*[10] that proprietary concerns were not raised by the parties for most network elements. For those network elements where parties did identify proprietary concerns, the FCC decided that access to the network was necessary.[11] We believe that Proprietary Information should only include trade secret information. Furthermore, a person asserting a proprietary restriction, should have to demonstrate that its is a trade secret and it is not possible to protect such information through conventional methods, such as a confidentiality agreement.

As noted by the FCC, "impair" is defined as to make or become worse, diminish in value.[12]

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[9] Access to Proprietary Information whether LEC or vendor proprietary has no effect as a practical matter. It is routine in the commercial market to handle access to Proprietary Information by execution of confidentiality agreements. In that way, the Proprietary Information is protected. In fact, confidentiality agreements are routinely used in proceeding before the FCC and state commissions. Adequate protection to available to all parties.

[10] *See Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No.96-98, First Report and Order, 11 FCC Rcd 15499 (1996) (*Local Competition First Report and Order*).

[11] See NPRM at ¶ 15 note 22.

[12] See *Local Competition First Report and Order*, 11 FCC Rcd at 15643, para.285 (quoting Random House College Dictionary 665 (re. ed. 1984)).

The term "impair" connotes some action substantially less than "prevent." Congress chose to use the word "impair" and did not use the word "prevent." Therefore, it is appropriate to view "impair" as applying to any "non-proprietary" UNE deemed necessary for providing retail competition by means of wholesale entry. This distinction supports our position that an expanded list of UNEs is appropriate.

The Act does not condition wholesale entry on whether resale or facility based alternatives are available. Therefore, in implementing the Act, the FCC's initial determination in the *Local Competition First Report and Order* to implement wholesale entry by specifying a minimum list UNEs was appropriate and reasonable. We believe that the FCC's analysis was proper at the time and subsequent events, i.e, the lack of competition, indicate such analysis is also appropriate today. The FCC surmised that rival telecommunications carriers in pursuit of local exchange competition are impaired if certain UNEs including "proprietary" UNEs are denied them. This is still the case.

We support an approach that includes reviews of the progress of competition and if necessary, the FCC over time should modify, enlarge, amend, or alter the minimum lists of UNEs. This approach best serves the public interest.

By way of example, the FCC foresaw that negotiation and arbitration process held out the promise that access to UNEs would be driven by market conditions and most likely expanded. Therefore, there might be little need for the FCC to expand its minimum list of UNEs as long as the goals of the Act were met. The "pick" and "choose" provisions of Section 252(i) of the Act would facilitate and broaden access to UNE and make those UNEs readablely available to all competitors. Subsequent events now confirm, that the FCC's reliance on negotiation and arbitration to expand UNE access has not worked well. For the most part, state commissions through their review and

approval of interconnection agreements have been unable to achieve meaningful competition let alone expansion of UNEs to be provided. When they have tried, protracted litigation has ensued. What these subsequent events unquestionably demonstrates is that the FCC needs to expand its minimum list of UNEs. Despite repeated attempts, no incumbent LEC has received 271 authority to offer in-region long distance. Section 271 is the acid test on whether the goals of the Act are being met. Unfortunately, they have not been met.

The Ratepayer Advocate believes that the Supreme Court's interpretation of the scope of Section 251(d)(2) is not inconsistent with Ratepayer Advocates's view of the statute which is the FCC has discretion to expand list of UNEs and may consider multiple factors. This is what Congress intended under Section 251(d)(2) of the Act.[13]

We view Section 251(d)(2) not as a limitation on the FCC's authority but an affirmation of Congress' intent that the FCC has the final say in the exercise of its discretion to determine what UNEs must be unbundled and when they are to be provided. Congress declined to draft the Act to state that "necessary" and "impair" tests are the only factors that can be considered.

The Ratepayer Advocate urges the FCC to adopt our analysis as being consistent with the Act as a whole. Congress did not intended to restrain the FCC from exercising discretion in the process. This could be the practical effect of a very narrow reading of the Supreme Court's decision. Such a reading is not warranted or appropriate.[14]

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[13] No one contends that all UNEs are proprietary. If all UNEs were proprietary, then under Section 251(d)(2), if viewed as a mandatory requirement (essential and necessary), the FCC must direct that all UNEs be made available to rival telecommunications carriers. However this does not mean that the list of UNEs should not be expanded, as necessary, to achieve the goals of the Act.

[14] It seems obvious that Congress did not want to direct incumbent LECs to make available all UNEs, instead it delegated that authority to the FCC subject to consideration of certain minimum factors but not requiring that those minimum factors are the sole and exclusive factors to be applied. Congress wanted a flexible set of rules

The FCC's determinations in this regard are entitled to deference subject only to review as arbitrary, capricious or an abuse of discretion. The FCC need not consider all factors but has the discretion to choose more factors.[15] On the other hand, if the goals of the Act were being met, the FCC could limit its evaluation to just the two factors. In that situation, the FCC would not exceed the bounds of its discretion.[16]

The FCC already considered the availability of UNEs outside of the LECs' network.

The FCC asked for comments on how the FCC should consider the availability of network elements outside of the incumbent's network in view of the Supreme Court's concern that the FCC failed to address this issue. The Ratepayer Advocate believes that the FCC implicitly considered the availability of UNEs outside of the incumbent LEC's network when it interprets the Act to permit entry in three distinct ways or to permit entry using any combination of the three.

A telecommunications carrier has the option to select one entry method to the exclusion of the other two entry methods permitted under the Act. Neither the Act nor the FCC's regulations place conditions on a telecommunications carriers' entry selection in relation to the availability of

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which they delegated to the FCC to adopt in implementing the Act

[15] Similarly, we submit if the FCC chose to modify its initial interpretation and adopt a broader interpretation, the revised determination would also be given deference by the Supreme Court

[16] In the NPRM, the FCC asks for comment on other factors that could be considered. The other factors include essential facility doctrine, the availability of network elements outside of the incumbent LECs networks, the cost and delay associated with obtaining network and the weight to be given various factors. See NPRM at ¶¶ 20-35. The Ratepayer Advocate believes the FCC has the discretion to select the factors and dismiss factors from its consideration. The litmus test is whether the FCC's decision as a whole promotes the goals of the Act. If it does, deference must be afforded the FCC for the factors it selects. Failure to consider a factor or a rejection of a factor, in and of itself should not negate or require the FCC to reconsider its decision or have that decision be subject to reversal and overturning as being arbitrary, capricious or an abuse of discretion. If the record as a whole reflects that the FCC's decision is supportable and reasonable, that decision should be given effect. This lies at the center of the legal principal that deference is accorded the administrative agency in implementation of an Act. To require consideration of all factors is facially inconsistent with the Act and it would be tantamount to rewriting the Act. Neither the Courts nor the FCC can rewrite the Act.

one or more network elements outside of the incumbent's network. The FCC did not impose conditions. The FCC left that decision to the entrant. The absence of conditions on selecting the method of entry makes it clear or is strong evidence that the FCC did consider the availability issue, and declined to require it. Therefore, the FCC could address the Supreme Court's concern by merely clarifying that they considered availability of network elements outside of the incumbent LECs network and implicitly rejected it. Subsequent events now suggests that the list of UNEs should be expanded because meaningful competition still is lacking.

The FCC must focus on fostering competition in the local exchange monopoly and the FCC must focus on maintaining that competition.

The FCC's actions so far have focused for the most part on jump starting competition in the local exchange market place. This clearly was Congress' desire and directive. The Act employs a carrot and stick approach to entice incumbent LECs to open their markets to competition in exchange for entry into in-region long distance market. Section 271 sets forth the tests that LECs must meet if they are to enter the long distance market. In applying these tests, the FCC acknowledges that the Department of Justice will not approve an application under Section 271 of the Act unless it is able to determine that the local market is fully and irreversiblely open to competition and each checklist item is met.

By implication, this means that over time continuing review is required of the status of competition including whether Section 271 requirements are met after the initial 271 authority is granted. Such periodic evaluations must take place on a going-forward basis. The FCC concluded in its *Local Competition First Report and Order* that "[w]e and the states will need to review level of competition, revise our rules as necessary, and reconcile arbitrated arrangements to those revisions

on a going-forward basis."[17] Over time, the cost for local exchange should fall and the rates for interconnection will change as well. Because innovations, technology, regulatory, and economic changes will impact competition, the status of competition will have to be monitored and appropriately modified and adjusted. Logically, some rules will be modified, other rules deleted and new rules adopted. What specific rules should apply over time must be tied to the goals of the Act, to promote competition now and to maintain it in the future in the local exchange market.

Competitive LEC unbundling.

Although the FCC previously rejected the suggestion that competitive LECs should not be directed to unbundle their networks for the benefit of new entrants, we believe that decision should be modified at this time. Because competition still does not exists, it is entirely reasonable to impose a competitive LEC unbundling requirement at this time to foster meaningful competition. Such a policy would ensure that any telecommunications carrier can enter and compete against the incumbent LECs and the competitive LECs. Under this scenario, competition would be enhanced and competition should flourish.

Future changes and forbearance.

There already exists under the Act multiple ways of effectuating changes in the rules and regulations implementing the Act. Petitions can be filed by telecommunications carriers seeking revision, modification or deletion of rules. This includes LECs, telecommunications carriers, State commissions and other interested parties. The FCC can trigger review by issuance of a Notice of Inquiry, and a Notice of Proposed Rulemaking. There is no shortage of ways to initiate and implement changes to the rule and regulations over time. In fact, Section 10(a) of the Act authorizes

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[17] *See Local Competition First Report and Order* at ¶¶ 113 and 114.

the FCC to forebear in the appropriate circumstance. Section 10(a) of the Act provides:

> Notwithstanding section 332(c)(1)(A) of this Act, the Commission shall forebear from applying any regulation, or any provision of this Act to a telecommunications carrier or telecommunications services, or class of telecommunications carriers or telecommunications services, in any or some of its or their geographic markets, if the Commission determines that--
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> (1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by or for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory;
>
> (2) enforcement of such regulation or provision is not necessary for the protection of consumers; and
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> (3) forbearance from applying such provision or regulation is consistent with the public interest.

Section 10(b) requires the FCC to weigh the competitive effect. This section provides as follows:

> In making the determination under subsection (a)(3), the Commission shall consider whether forbearance from enforcing the provision or regulations will promote competitive market conditions, including the extent to which such forbearance will enhance competition among providers of telecommunications services. If the Commission determines that such forbearance will promote competition among providers of telecommunications services, that determination may be the basis for a Commission finding that forbearance is in the public interest.[18]

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[18] See Section 10 of the Act. The FCC's forbearance authority under the Act must be reconciled with the State commissions rights to impose requirements that expand rights and obligations if they are necessary to further competition in the provision of telephone exchange or exchange access under Section 261(c). A State commission is limited only if its action is inconsistent with Section 261 and the Commission's regulations implementing this part. Section 10(e) of the Act limits state enforcement after forbearance by the FCC. Section 10(e) provide: "A State commission may not continue to apply or enforce any provision of this Act that the Commission has determined to forbear from applying under subsection(a)." Under the existing regulations the FCC adopted minimum standards but authorized to the states impose additional requirements beyond the minimum requirements. There are complex jurisdictional and statutory interpretational questions that require careful analysis and resolution. The FCC has concluded and directed that it will preempt any inconsistent or conflicting requirements imposed by the State commissions under Section 253 of the Act. See Memorandum Opinion & Order, FCC 97-346, 13 FCC Rcd 3460 (1997). Constitutional issues arise as well. Can the FCC by forbearance in effect repeal the Act. Such a result would raise serious separation of powers questions. Only Congress can change the law. The executive branch enforces the law.

The "pick and choose" rules

The FCC correctly states that its "pick and choose" rules raise numerous issues on how they should apply once the underlying interconnection agreement has expired. As a practical matter, only if rates for interconnection go up is this a problem. If rates decrease, due to negotiation or arbitration of subsequent interconnection agreements, or due to action by the FCC or State commissions, those reduced rates would be available under Section 252(i) of the Act. It would appear unreasonable to require a carrier under Section 251(i) to select a rate and apply it to its interconnection agreement, when the underlying interconnection agreement has expired. Of course, the parties can negotiate or arbitrate that issue if they so decide. Rates, terms, and conditions arguably would survive the expiration of the contract if an entrant other than the parties to the interconnection agreement decide to exercise its "pick and choose" rights while the contract was in effect. Under this scenario, rates, terms, and conditions could be extended indefinitely into the future.

We submit that the FCC has the discretion to foreclose such a result. After all, an interconnection agreement is a contract and it is reasonable to conclude that one should only be bound for the term of that contract. Parties should be free to negotiate in good faith for a follow on contract.[19] The overriding factor that should be consider is whether the goals of the Act are met. The FCC also has the discretion to permit limited or unlimited extension of rates, terms and conditions

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[19] This does not suggest that the term of an interconnection agreement should not be extended if review of such agreement under Section 252(e)(6) of the Act requires revisions to the agreement. The most obvious circumstance is when an interconnection agreement after court review is modified or changed pursuant to a successful appeal by a party. In that case, the prevailing party should be able to have the benefit of its agreement, including its term enforced. This means that the term should be extended for the time period the matter was pending on appeal. If the appeal took one year and the initial term of the interconnection agreement was three years, the interconnection agreement should be extended by one year. During the initial term or the extended term, another telecommunications carrier should be able to exercise its rights under Section 252(i) of the Act for the remaining term of the interconection agreement.

contained in expired agreements. This is a policy judgment.

The FCC posits several additional questions. The FCC asks what standards should apply to selection of additional UNEs, or the removal of UNEs? Secondary issues are raised by the FCC, such as, who should have the burden of proof, and whether new unbundling rules should be give retroactive or prospective effect? If given prospective effect, should they be effective for a specified term? The Ratepayer Advocate acknowledges all these questions raise legitimate issues which will require consideration so that the Act is properly implemented. The overriding consideration in addressing these issues should be the goals of the Act, competition, lower prices, more choices and innovative technology.

If the core goals of increased competitition and less regulation are considered, the result will be development of a competitive market versus a monopoly market. In that regard, we believe its is appropriate to give serious consideration to further unbundling such as dark fiber and subloop unbundling. The local exchange market is the head and source from which all services eminent. One must have competition for all services which use the local network which is POTS, video, voice, digital and advance services. At a minimum, the Ratepayer Advocate urges the FCC to expand the list of UNEs. The FCC has the benefit now of more than three years of results in which to access whether its rules implementing the Act have been successful. It is clear that the FCC reliance on state supervised and sanctioned arbitrations and negotiations have not jump started competition. For dark fiber and subloop unbundling, the process has lead to inconsistent results. Some state commissions have permitted it and some have denied access. This clear lack of consensus when judged by the results of the past three years, strongly suggests that the FCC should now expand its minimum list of UNEs. Dark fiber and subloop unbundling should be required as

a uniform national standard.

CONCLUSION

The Ratepayer Advocate submits that the FCC should broaden its interpretation of "necessary" and "impair" set forth in Section 251(d)(2) of the Act. At the very least, both factors should be considered when "proprietary" UNEs are involved and the "impair" factor should be considered for non-proprietary UNEs. The Ratepayer Advocate believes that the FCC should clarify that these factors are minimum factors and not the exclusive factors that the FCC may use in determining what UNEs must be made available to telecommunications carriers.

In assessing other factors, we urge the FCC to place great weight on the goals of the Act and whether those goals are frustrated or hindered by a particular UNE determination. The public interest in having meaningful competition should be at the top of the list of all factors. The Ratepayer Advocate urges the FCC to reevaluate whether it should require competitive LECs to unbundle their networks because after three years of results and looking towards the future, we believe it is necessary if competition is going to be achieved now and maintained into the future. We urge the FCC to impose an unbundling requirement on competitive LECs in this proceeding.

Very truly yours,

BLOSSOM A. PERETZ, ESQ.
DIVISION OF THE RATEPAYER ADVOCATE

By: _____
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